

Decision 06-05-028 May 25, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of LMDS Holdings, Inc. for a Certificate of Public Convenience and Necessity to Provide Competitive Local Exchange Services and Interexchange Services Combined Resale and Limited Facilities Basis in the State of California.

Application 05-12-025
(Filed December 22, 2005)

O P I N I O N

I. Summary

LMDS Holdings, Inc. (Applicant) seeks a certificate of public convenience and necessity (CPCN) under Pub. Util. Code §§ 701, 702, and 709 for authority to provide limited facilities-based and resold local exchange telecommunications services as a competitive local carrier (CLC).¹ By this decision, we grant the requested authority subject to the terms and conditions set forth below.

II. Background

In prior decisions, we authorized the provision of competitive local exchange service within the service territories of Pacific Bell Telephone Company

¹ A CLC is a common carrier that is issued a CPCN to provide local exchange telecommunications service for a geographic area specified by such carrier. While the caption to this application includes interexchange as well as local exchanges services within the scope of the request, the application body only seeks a CPCN for limited facilities based and resold CLC services.

(Pacific), Verizon California Inc. (Verizon), SureWest Telephone (SureWest),² and Citizens Telecommunications Company of California, Inc. (CTC).

Applicant, a Delaware corporation, requests authority to operate as a limited facilities-based and resale provider of local exchange services throughout California but initially within Pacific's and Verizon's service territories.

Applicant's principal place of business is located in Reston, Virginia.

Applicant is a wholly owned subsidiary of XO Communications, Inc., a publicly traded corporation in which Carl C. Icahn holds a majority interest. XO California, Inc. (U5553) is a certificated carrier and wholly owned subsidiary of Applicant.

Applicant seeks authority to provide telecommunications transport services, as a facilities-based and resale competitive local exchange and interexchange carrier, to business customers and other carriers in the State of California. Applicant plans to initially offer dedicated point-to-point transport and data services to enterprise customers and other common carriers. At a later date, Applicant may expand its service offerings to include a broader range of products and services. Accordingly, Applicant is requesting a CPCN to provide a full range of local exchange and interexchange services.

Although Applicant intends ultimately to operate throughout the state, it will initially serve business customers largely, if not entirely, located in the service territories of Pacific and Verizon. Accordingly, it requests permission to concur in these carriers' service area maps on file with the Commission.

² SureWest was previously known as Roseville Telephone Company.

Applicant's equipment will support both time division multiplexing and Internet protocol services.

III. Financial Qualifications

To be granted a CPCN for authority to provide facilities-based and resold local exchange service, an applicant must demonstrate that it has \$100,000 cash or cash equivalent to meet the firm's start-up expenses. The applicant must also demonstrate that it has sufficient additional resources to cover all deposits required by other telecommunications carriers in order to provide service in California.³ Applicant provided financial documentation that demonstrates that it meets the financial requirements.

IV. Technical Qualifications

To be granted a CPCN for authority to provide local exchange service, an applicant must make a reasonable showing of technical expertise in telecommunications or a related business. Applicant supplied biographical information on its management that demonstrates that it has sufficient expertise and training to operate as a telecommunications provider. In particular, Applicant's wholly owned subsidiary XO California, Inc. (U5553) is a presently certificated carrier in good standing.

Applicant represents that no one associated with or employed by Applicant as an affiliate, officer, director, partner, or owner of more than 10% of Applicant was previously associated with a telecommunications carrier that filed for bankruptcy, or was sanctioned by the Federal Communications Commission

³ The financial standards for certification to operate as a CLC are set forth in Decision (D.) 95-12-056, Appendix C, Rule 4.B.

or any state regulatory agency for failure to comply with any regulatory statute, rule, or order.

V. Tariffs

Commission staff reviewed Applicant's draft tariffs for compliance with Commission rules and regulations. The deficiencies are noted in Attachment A to this decision. In its compliance tariff filing, Applicant is directed to correct these deficiencies as a condition of our granting approval of its tariffs.

VI. California Environmental Quality Act (CEQA)

CEQA requires the Commission as the designated lead agency to assess the potential environmental impact of a project in order that adverse effects are avoided, alternatives are investigated, and environmental quality is restored or enhanced to the fullest extent possible. Since Applicant states that it will not be constructing any facilities for the purpose of providing local exchange services, except for equipment to be installed in existing buildings or structures, it can be seen with certainty that there is no possibility that granting this application will have an adverse impact upon the environment. Applicant must file for additional authority before it can construct facilities other than equipment to be installed in existing buildings or structures.

VII. Conclusion

We conclude that the application conforms to our rules for certification as a CLC. Accordingly, we shall grant Applicant a CPCN to provide local exchange service, subject to compliance with the terms and conditions set forth herein.

VIII. Categorization and Need for Hearings

In Resolution ALJ 176-3165, dated January 12, 2006, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received.

There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

IX. Comments on Draft Decision

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

X. Assignment of Proceeding

John A. Bohn is the Assigned Commissioner and Karl J. Bemmesderfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. A notice of the filing of the application appeared in the Daily Calendar on December 23, 2005.
2. There were no protests to this application.
3. A hearing is not required.
4. In prior decisions, the Commission authorized competition in providing local exchange telecommunications services within the service territories of Pacific, Verizon, SureWest, and CTC.
5. Applicant has a minimum of \$100,000 of cash or cash equivalent that is reasonably liquid and readily available to meet its start-up expenses.
6. Applicant has sufficient additional cash or cash equivalent to cover any deposits that may be required by other telecommunications carriers in order to provide the proposed service.
7. Applicant's management possesses sufficient experience and knowledge to provide local exchange services to the public.

8. Applicant's wholly owned subsidiary XO California, Inc. (U5553) is a presently certificated carrier in good standing.

9. As part of its application, Applicant submitted a draft of its initial tariffs that contained the deficiencies identified in Attachment A to this decision. Except for these deficiencies, Applicant's draft tariffs complied with the Commission's requirements.

10. Applicant does not propose to construct any facilities, except for equipment to be installed in existing buildings or structures, in order to provide the proposed service.

Conclusions of Law

1. Applicant has the financial ability to provide the proposed service.

2. Applicant has made a reasonable showing of technical expertise in, or related to, telecommunications.

3. Public convenience and necessity require the competitive local exchange services to be offered by Applicant, subject to the terms and conditions set forth herein.

4. The application should be granted to the extent set forth below.

5. Applicant, once granted a CPCN, should be subject to the applicable Commission rules, decisions, General Orders, and statutes that pertain to California public utilities.

6. Applicant's initial tariff filing should correct the deficiencies noted in its draft tariffs as indicated in Attachment A to this decision.

7. Since Applicant does not propose to construct any facilities, except for equipment to be installed in existing buildings or structures, it can be seen with certainty that granting it authority to provide local exchange services will not have a significant adverse effect upon the environment.

8. Because of the public interest in competitive local exchange services, the following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity (CPCN) is granted to LMDS Holdings, Inc. (Applicant) to provide limited facilities-based and resold local exchange services in the service territories of Pacific Bell Telephone Company, Verizon California Inc., SureWest Telephone, and Citizens Telecommunications Company of California, Inc., subject to the terms and conditions set forth below.
2. Applicant is authorized to file tariff schedules for the provision of competitive local exchange services. Applicant may not offer competitive local exchange services until tariffs are on file. Applicant's initial filing shall be made in accordance with General Order 96-A, excluding Sections IV, V, and VI, and shall correct the deficiencies noted in Attachment A. The tariffs shall be effective not less than one day after approval by the Commission's Telecommunications Division. Applicant shall comply with its tariffs.
3. The certificate granted and the authority to render service under the rates, charges, and rules authorized herein will expire if not exercised within 12 months after the effective date of this order.
4. The corporate identification number assigned to Applicant, U-6990-C, shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.
5. Applicant shall comply with the requirements applicable to competitive local exchange carriers included in Attachment B to this decision.

6. Applicant is not authorized to construct facilities, except for equipment to be installed in existing buildings or structures.

7. Application 05-12-025 is closed.

This order is effective today.

Dated May 25, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

ATTACHMENT A

List of deficiencies in tariffs filed by LMDS Holdings, Inc. in A.05-12-025 to be corrected in its tariff compliance filing.

1. Page 1 – Include website URL for published tariffs, or location of an office in the California service territory where customers may inspect or copy tariffs (D.01-07-026).
2. Page 29 – Include a telephone number of a representative of the company who can provide additional information or institute arrangements for payment (D.95-07-054, Appendix A 6.B.7).
3. Page 29 (2.7.6) – Backbilling is only allowed for one and one half years in the case of customer fraud (D.86-12-025).
4. Include any sample forms in use in the CLC tariff (General Order (GO) 96-A, II.C.5).

(END OF ATTACHMENT A)

ATTACHMENT B

REQUIREMENTS APPLICABLE TO COMPETITIVE LOCAL EXCHANGE CARRIERS AND NON-DOMINANT INTEREXCHANGE CARRIERS

1. Applicant shall file, in this docket, a written acceptance of the certificate granted in this proceeding within 30 days of the effective date of this order.

2. Applicant is subject to the following fee and surcharges that must be regularly remitted per the instructions in Appendix E to Decision (D.) 00-10-028. The Combined California PUC Telephone Surcharge Transmittal Form must be submitted even if the amount due is zero.

- a. The current 1.29% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the Universal Lifeline Telephone Service Trust Administrative Committee Fund (Pub. Util. Code § 879; Resolution T-16966, dated December 1, 2005, effective January 1, 2006);
- b. The current 0.27% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Relay Service and Communications Devices Fund (Pub. Util. Code § 2881; D.98-12-073 and Resolution T-16965, dated December 1, 2005, effective January 1, 2006);
- c. The user fee provided in Pub. Util. Code §§ 431-435, which is 0.11% of gross intrastate revenue (Resolution M-4816, dated March 15, 2006, effective April 1, 2006);
- d. The current 0.21% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-A (Pub. Util. Code § 739.3; D.96-10-066, pp. 3-4, App. B, Rule 1.C; Resolution T-16963, dated December 1, 2005, effective January 1, 2006);
- e. The current 2.00% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-B

(D.96-10-066, p. 191, App. B, Rule 6.F.; Resolution T-16964, dated December 1, 2005, effective January 1, 2006); and

- f. The current 0.13% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Teleconnect Fund (D.96-10-066, p. 88, App. B, Rule 8.G; Resolution T-16888, dated December 1, 2005, effective January 1, 2006).

Note: These fees change periodically. In compliance with Resolution T-16901, December 2, 2004, Applicant should check the joint tariff for surcharges and fees filed by Pacific Bell (dba SBC California) and apply the current surcharge and fee amounts in that joint tariff on end-user bills until further revised.

3. Applicant is a competitive local exchange carrier (CLC). The effectiveness of its future tariffs is subject to the schedules set forth in Appendix C, Section 4.E of D.95-12-056:

“E. CLCs shall be subject to the following tariff and contract filing, revision and service pricing standards:

- “(1) Uniform rate reductions for existing tariff services shall become effective on five (5) working days’ notice to the Commission. Customer notification is not required for rate decreases.
- “(2) Uniform major rate increases for existing tariff services shall become effective on thirty (30) days’ notice to the Commission, and shall require bill inserts, or a message on the bill itself, or first class mail notice to customers at least 30 days in advance of the pending rate increase.
- “(3) Uniform minor rate increases, as defined in D.90-11-029, shall become effective on not less than five (5) working days’ notice to the Commission. Customer notification is not required for such minor rate increases.
- “(4) Advice letter filings for new services and for all other types of tariff revisions, except changes in text not affecting rates or relocations of text in the tariff schedules, shall become effective on forty (40) days’ notice to the Commission.

- “(5) Advice letter filings revising the text or location of text material which do not result in an increase in any rate or charge shall become effective on not less than five (5) days’ notice to the Commission.
- “(6) Contracts shall be subject to GO 96-A rules for NDIECs, except interconnection contracts.
- “(7) CLCs shall file tariffs in accordance with PU Code Section 876.”

4. Applicant may deviate from the following provisions of GO 96-A:
(a) paragraph II.C.(1)(b), which requires consecutive sheet numbering and prohibits the reuse of sheet numbers; and (b) paragraph II.C.(4), which requires that “a separate sheet or series of sheets should be used for each rule.” Tariff filings incorporating these deviations shall be subject to the approval of the Commission’s Telecommunications Division. Tariff filings shall reflect all fees and surcharges to which Applicant is subject, as reflected in #2 above.

5. Applicant shall file a service area map as part of its initial tariff.

6. Prior to initiating service, Applicant shall provide the Commission’s Consumer Affairs Branch with the name and address of its designated contact person(s) for purposes of resolving consumer complaints. This information shall be updated if the name or telephone number changes, or at least annually.

7. Applicant shall notify the Director of the Telecommunications Division in writing of the date that local exchange service is first rendered to the public, no later than five days after service first begins.

8. Applicant shall keep its books and records in accordance with the Generally Accepted Accounting Principles.

9. In the event Applicant’s books and records are required for inspection by the Commission or its staff, it shall either produce such records at the

Commission's offices or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to its office.

10. Applicant shall file an annual report with the Director of the Telecommunications Division, in compliance with GO 104-A, on a calendar-year basis with the information contained in Attachment C to this decision.

11. Applicant shall file an affiliate transaction report with the Director of the Telecommunications Division, in compliance with D.93-02-019, on a calendar-year basis using the form contained in Attachment D.

12. Applicant shall ensure that its employees comply with the provisions of Pub. Util. Code § 2889.5 regarding solicitation of customers.

13. Within 60 days of the effective date of this order, Applicant shall comply with Pub. Util. Code § 708, Employee Identification Cards, and notify the Director of the Telecommunications Division in writing of its compliance.

14. If Applicant is 90 days or more late in filing an annual report, or in remitting the surcharges and fee listed in #2 above, the Telecommunications Division shall prepare for Commission consideration a resolution that revokes Applicant's CPCN unless it has received written permission from the Telecommunications Division to file or remit late.

15. Applicant is exempt from GO 96-A, subsections III.G(1) and (2), and Rule 18(b) of the Commission's Rules of Practice and Procedure.

16. Applicant is exempt from Pub. Util. Code §§ 816-830.

17. Applicant is exempt from the requirements of Pub. Util. Code § 851 for the transfer or encumbrance of property whenever such transfer or encumbrance serves to secure debt.

18. If Applicant decides to discontinue service or file for bankruptcy, it shall immediately notify the Telecommunications Division's Bankruptcy Coordinator.

19. Applicant shall send a copy of this decision to concerned local permitting agencies not later than 30 days from the date of this order.

(END OF ATTACHMENT B)

ATTACHMENT C ANNUAL REPORT

An original hard copy, and a machine-readable electronic copy on a CD or floppy disk using Microsoft Word or a compatible format, shall be filed with the California Public Utilities Commission, 505 Van Ness Avenue, Room 3107, San Francisco, CA 94102-3298. The filing shall be made no later than March 31st of the year following the calendar year for which the annual report is submitted.

Failure to file this information on time may result in a penalty as provided for in Sections 2107 and 2108 of the Public Utilities Code.

Required information:

1. Exact legal name and U # of reporting utility.
2. Address.
3. Name, title, address, and telephone number of the person to be contacted concerning the reported information.
4. Name and title of the officer having custody of the general books of account and the address of the office where such books are kept.
5. Type of organization (e.g., corporation, partnership, sole proprietorship, etc.).
If incorporated, specify:
 - a. Date of filing articles of incorporation with the Secretary of State.
 - b. State in which incorporated.
6. The number and date of the Commission decision granting the Utility's CPCN.
7. Date operations were begun.
8. Description of other business activities in which the utility is engaged.
9. A list of all affiliated companies and their relationship to the utility. State if affiliate is a:
 - a. Regulated public utility.
 - b. Publicly held corporation.
10. Balance sheet as of December 31st of the year for which information is submitted.
11. Income statement for California operations for the calendar year for which information is submitted.

For answers to any questions concerning this report, call (415) 703-2883.

(END OF ATTACHMENT C)

ATTACHMENT D
CALENDAR YEAR AFFILIATE TRANSACTION REPORT

1. Each utility shall list and provide the following information for each affiliated entity and regulated subsidiary that the utility had during the period covered by the annual Affiliate Transaction Report.

- Form of organization (e.g., corporation, partnership, joint venture, strategic alliance, etc.);
- Brief description of business activities engaged in;
- Relationship to the utility (e.g., controlling corporation, subsidiary, regulated subsidiary, affiliate);
- Ownership of the utility (including type and percent ownership);
- Voting rights held by the utility and percent; and
- Corporate officers.

2. The utility shall prepare and submit a corporate organization chart showing any and all corporate relationships between the utility and its affiliated entities and regulated subsidiaries in #1 above. The chart should have the controlling corporation (if any) at the top of the chart; the utility and any subsidiaries and/or affiliates of the controlling corporation in the middle levels of the chart and all secondary subsidiaries and affiliates (e.g., a subsidiary that in turn is owned by another subsidiary and/or affiliate) in the lower levels. Any regulated subsidiary should be clearly noted.

3. For a utility that has individuals who are classified as “controlling corporations” of the competitive utility, the utility must only report under the requirements of #1 and #2 above any affiliated entity that either (a) is a public utility or (b) transacts any business with the utility filing the annual report excluding the provision of tariffed services.

4. Each annual report must be signed by a corporate officer of the utility stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

5. Any required material that a utility is unable to provide must be reasonably described and the reasons the data cannot be obtained, as well as the efforts expended to obtain the information, must be set forth in the utility's annual Affiliate Transaction Report and verified in accordance with Sections I-F of Decision 93-02-019.

6. Utilities that do not have affiliated entities must file, in lieu of the annual transaction report, an annual statement to the Commission stating that the utility had no affiliated entities during the report period. This statement must be signed by a corporate officer of the utility, stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

(END OF ATTACHMENT D)